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ALEXANDER L. STEVAS,
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No. 82-499.

In the

Supreme Court of the United States.

OCTOBER TERM, 1982.

JOHN D. COLE, III,
Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
SEYMOUR YANOFF AND AMY KONOWITZ,
RESPONDENTS.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Petitioner John D. Cole, III, responds to the respective sections of the respondents' brief in opposition to his petition for a writ of certiorari.

I. Reasons for Granting the Writ.

The respondents simply assert, without supporting facts or argument, that the questions presented by Cole have no significance beyond the specific controversy between the parties (Opposition, p. 3). This is not true. Each of the three issues presented by Cole involves, in a somewhat different way, the question of the extent to which this Court's decisions under the First and Fourteenth Amendments are to displace state law of substance or procedure in defamation cases. Prior to *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this was thought to be the preserve of state law. Having declared the applicability of the First and Fourteenth Amendments to this field, this Court cannot now abdicate its responsibility to define on a case-by-case basis, which is the only means available, the extent of the Constitution's control. It is, of course, for this Court to determine how important these questions of federalism are, but the respondents are incorrect in asserting that Cole has presented no questions of federalism at all.

The respondents seem to suggest by the quotation from *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (Opposition, p. 4), that this Court should be totally indifferent to injustice between the parties. After listening to sharply conflicting evidence, the jury concluded the two-week trial with a verdict for Cole, finding that the television station had fired and defamed him to appease Boston Mayor White and to implement the "happy talk" news show. Even though it had no opportunity to judge the credibility of the witnesses, the Supreme Judicial Court totally ignored Cole's version of the evidence and reversed, relying on misinterpretations of the decisions of this Court. The errors have been committed in the name of this Court's decisions, and only this Court can correct them.

II. The Impact of New York Times Co. v. Sullivan on the State Rule for Judgment Notwithstanding the Verdict.

The respondents assert (Opposition, p. 5) that the Supreme Judicial Court's reading of *New York Times Co.* v. *Sullivan, supra*, as requiring it to disregard its settled practice for judgment notwithstanding the verdict is independent of state grounds. However, there is nothing in the Supreme Judicial Court's opinion to support this assertion. The Supreme Judicial Court's three reasons for not requiring the directed verdict motion as a foundation for the motion for judgment notwithstanding the verdict are stated cumulatively, not in the alternative. (Appendix A to the petition, pp. 5a-6a.) At the very least, the two non-constitutional reasons are so interwoven with the constitutional reason so as not to be independent and were seen by the Supreme Judicial Court as insufficiently broad to sustain the decision without the constitutional reason. *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U.S. 157, 164 (1917) (*see* Petition, p. 2).

III. Whether the First Amendment Renders the Statements at Issue Non-Actionable.

Next, the respondents assert that the Supreme Judicial Court's decision that the statements in question were non-actionable matters of opinion rests entirely on state law (Opposition, p. 8). Totally ignored by this assertion is the fact that state law in this area has been bounded and shaped by the requirements of the First Amendment as stated in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974):

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we

> depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. (Footnote omitted.)

It is simply incorrect for the respondents to assert that it is not a federal question to determine where the constitutional dividing line is to be drawn.

IV. Applicability of Constitutional Standards Generally.

On the broader question of whether any constitutional standards apply to cases of private defamation, the respondents rely on an assertion that Cole did not raise this question below and that the Supreme Judicial Court did not decide it. The respondents state that "Cole has never challenged the jury finding that he was a public figure" (Opposition, p. 11 n.6). However, Cole cross-appealed from all of the trial court's instructions importing constitutional standards. It is true that the Supreme Judicial Court did not reach the constitutional issue of actual malice. However, the Supreme Judicial Court's decisions on constitutional grounds on other issues implicitly reject Cole's contentions on his cross-appeal.

V. Conclusion.

Because the Supreme Judicial Court of Massachusetts has decided important questions of federal law which have not been, but should be, settled by this Court, and has decided

such questions in a way in conflict with the applicable decisions of this Court, the petition should be granted.

Respectfully submitted,

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